

- “1. Whether the Assistant Director exceeded his authority and jurisdiction in finding that claimant’s average weekly wage was \$400.
- “2. Whether the Assistant Director has the authority to amend or change a previous Order that was not appealed.

- “3. Whether the Assistant Director exceeded his authority and jurisdiction in changing the preliminary hearing order when no additional new evidence was submitted.”

The respondent in his brief filed before the Appeals Board raised the following additional issue:

4. Whether the Assistant Director exceeded his jurisdiction and authority when he ordered the respondent to pay the higher weekly temporary total disability compensation rate retrospectively to claimant's date of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

1. This preliminary hearing which is the subject of this appeal was held on February 21, 1997, before Assistant Director Brad E. Avery, acting in the capacity of an Administrative Law Judge as authorized by K.S.A. 1996 Supp. 44-551(a). Previously, three other preliminary hearings were held in this case before Administrative Law Judge Alvin E. Witwer who retired prior to the February 21, 1997, preliminary hearing. Following a preliminary hearing held on August 5, 1996, Administrative Law Judge Witwer entered a preliminary hearing Order dated August 20, 1996, that granted claimant's request for temporary total disability compensation finding that the weekly amount of compensation should be the statutory minimum of \$25 as provided for in K.S.A. 44-510c(b)(1). Thereafter, the claimant filed another application for preliminary hearing claiming proof of an increased average weekly wage and requesting the weekly compensation rate to be adjusted accordingly.

The Assistant Director in his Order dated February 25, 1997, found claimant's average weekly wage to be \$400 and ordered the weekly compensation rate to be adjusted accordingly. The Assistant Director further ordered respondent, Century Roofing, to pay the increased weekly rate effective from the date of accident. From that preliminary hearing Order, respondent appealed, first contending that the Assistant Director exceeded his jurisdiction in finding that claimant's average weekly wage was \$400.

The initial issue the Appeals Board will address in this case is whether it has the jurisdiction to review the findings of this preliminary hearing Order. K.S.A. 1996 Supp. 44-534a specifically grants the Appeals Board jurisdiction to conduct a *de novo* review of findings in a preliminary hearing Order if any of the following issues are disputed:

- (A) Whether claimant suffered an accidental injury.

- (B) Whether the injury arose out of and in the course of employee's employment.
- (C) Whether notice was given.
- (D) Whether claim is timely made.
- (E) Whether certain other defenses apply.

K.S.A. 1996 Supp. 44-551 also grants the Appeals Board jurisdiction to review findings of a preliminary hearing order if the appeal otherwise alleges that the Administrative Law Judge exceeded his or her jurisdiction. In the instant case, the Appeals Board finds respondent has not raised one of the jurisdictional issues listed in K.S.A. 1996 Supp. 44-534a. Nevertheless, the Appeals Board finds the respondent has questioned the jurisdiction of the Administrative Law Judge to make the finding that claimant's average weekly wage is \$400. Accordingly, the Appeals Board has the limited review of whether, in its judgment, the Assistant Director has exceeded his jurisdiction in making this preliminary finding.

The Appeals Board concludes the preliminary hearing statute, K.S.A. 1996 Supp. 44-534a, grants the Administrative Law Judge specific authority to make a preliminary award of temporary total disability compensation. The Appeals Board also finds that an essential component of an award of temporary total disability compensation is the determination of claimant's average weekly wage. Accordingly, the Appeals Board finds the Assistant Director did not exceed his jurisdiction in making the \$400 average weekly wage finding.

2, 3. The respondent next argues that the Assistant Director exceeded his jurisdiction in changing the previous preliminary hearing Order not appealed to the Appeals Board. The respondent also argues that the Assistant Director exceeded his authority when the previous preliminary hearing Order was modified when no new evidence was presented.

The Appeals Board has had an opportunity previously to visit both of these issues. In the case of McClendon v. IBP, Inc., Docket No. 172,151 (June 1996), the Appeals Board found:

"A preliminary hearing order does not become a final order when no appeal is taken. It retains its character as a preliminary order even after the time for review by the Appeals Board has passed. The Appeals Board has held in prior decisions that there is no limitation on the number of preliminary hearings an Administrative Law Judge may hold in a case. Furthermore, the Administrative Law Judge has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require."

Accordingly, the Appeals Board concludes it is within the sound discretion and authority of the Administrative Law Judge to determine the number of preliminary hearings to be

held and whether a prior preliminary hearing Order should be modified based on the evidence presented.

4. Finally, the respondent contends the Assistant Director had no statutory authority to order the respondent to pay the higher weekly temporary total disability compensation rate retrospectively to claimant's date of accident. The Appeals Board disagrees. The Appeals Board finds that the preliminary hearing statute, K.S.A. 1996 Supp. 44-534a, provides that temporary total disability compensation may be ordered paid for all periods of temporary total disability prior to the date of filing the application for preliminary hearing.

Based on the reasons stated above, the Appeals Board finds that the Assistant Director did not exceed his jurisdiction when he held a preliminary hearing in this case and found claimant's average weekly wage was \$400 which modified a finding in the prior preliminary hearing Order. Furthermore, the Assistant Director did not exceed his jurisdiction when he ordered the respondent to pay the higher temporary total disability weekly compensation rate retrospectively to claimant's date of accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Assistant Director Brad E. Avery dated February 25, 1997, is affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Kip A. Kubin, Overland Park, KS
B. Scott Tschudy, Overland Park, KS
Brad E. Avery, Assistant Director
Office of Administrative Law Judge, Overland Park, KS
Philip S. Harness, Director